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No. 80-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CIRCUIT JUDGES DIXIE
HERLONG CHASTAIN, etc., et al.,

Petitioners,

-vs-

HILARY DAVIS, individually
and on behalf of all others
similarly situated,

Respondents.

SUPPLEMENTAL BRIEF

JIM SMITH
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL
(Counsel of Record)

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
904/488-1573

ATTORNEYS FOR PETITIONERS

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SUPPLEMENTAL BRIEF

This Supplemental Brief is filed pursuant to Rule 22.6, Rules of the United States Supreme Court, to address the decision in Lassiter v. Department of Social Services of Durham County, North Carolina, ___U.S.___, 68 L.Ed.2d 640, 101 S.Ct. ___ (June 1, 1981),[1/]

1/ This decision was subsequent to the May 7, 1981, service of the Petition for Writ of Certiorari filed herein.

in which this Court held that there is no absolute right to appointment of counsel in state court parental status termination proceedings, but that such a determination, in the first instance, should be made on a case-by-case basis by the state trial courts.

ARGUMENT

THE HOLDING BY THIS COURT IN LASSITER v. DEPARTMENT OF SOCIAL SERVICES, SUPRA, IS CONTROLLING IN THIS CASE AND THE COURT SHOULD ACCORDINGLY REMAND THIS CASE TO THE FIFTH CIRCUIT COURT OF APPEALS FOR ACTION IN ACCORD THEREWITH.

In Lassiter v. Department of Social Services, supra, this Court reviewed the due process requirements with regard to indigent litigants in cases involving termination by the state of parental rights and found that, in a given case, the parents

may be entitled to counsel, but that the right is not absolute and is properly left to the trial court to determine on a case-by-case basis:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the Eldridge factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," Gagnon v. Scarpelli, supra, 411 US at 788, 36 L Ed 2d 656, 93 S Ct 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in Gagnon v. Scarpelli, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., Wood v. Georgia, ___US___,

67 L Ed 2d 220, 101 S Ct 1097.[1]

This opinion is in direct conflict with the en banc opinion of the Fifth Circuit Court of Appeals which is on appeal. In that opinion,[2] the en banc majority specifically held that in all dependency proceedings pursuant to Chapter 39, Florida Statutes, except temporary emergency situations involving immediate threat to life or safety of the child, due process requires that indigent

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1/ This Court, earlier in the Lassiter decision, indicated that an absolute right to appointed counsel exists only in cases of loss of physical liberty:

> In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

2/ See Davis v. Page, 640 F.2d 604 and see fn. 7 (5th Cir. 1981).

parents be offered counsel[1/] and that counsel be supplied unless a knowing and intelligent waiver is made.[2/] The Court of Appeals, in fact, clearly stated:

> . . . In our view the complexity of these proceedings always necessitates the offer of counsel to avoid the erroneous deprivation of a fundamental liberty interest. The right involved is absolute and should not be subject to the discretion of the trial judge. We thus hold that in a formal adjudication of dependency under Florida law, where prolonged or indefinite deprivation of parental custody is threatened, due process requires that an indigent parent be offered counsel and that counsel be provided

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1/ It must be noted that Davis v. Page is a certified class action on behalf of "all indigent parents who have been or may be Defendants in child dependency and englect proceedings in the Juvenile and Family Division of the Circuit Court of Dade County, Florida, without being advised of their right to counsel or afforded the right to Court appointed counsel and is not simply a question of the right of Respondent Davis to an attorney."(Amended Final Judgment, A 171-172)

2/ Davis v. Page, 640 F.2d 604 and see fn. 7 (5th Cir. 1981).

> unless a knowing and intelligent waiver is made.
>
> 640 F.2d at 604.

This applies not only to cases involving permanent loss of custody, but to temporary or indefinite loss of custody, which in fact was the situation of the class representative in Davis.

The en banc dissent in Davis v. Page, approved the "case by case" approach to providing counsel now mandated by the Florida Supreme Court for cases involving temporary loss of custody in Potvin v. Keller, 313 So.2d 702 (Fla. 1975). In fact, the Florida Supreme Court has already gone beyond the United States Supreme Court, as it has required that counsel be appointed for all indigent parents in all dependency proceedings pursuant to Chapter 39, Florida Statutes, which involves permanent loss of custody, which was the Lassiter situation. In the Interest of D.B. & D.S., 385 So.2d

83 (Fla. 1980).

In summary, the courts of Florida have more than adequately met the constitutional requirements for protecting the indigent parent in dependency proceedings and have in fact provided protection in excess of that required by the Supreme Court in Lassiter. The Fifth Circuit's en banc rejection of a case-by-case analysis by the trial court of the due process need for counsel, coupled with the right to appellate review, is a clear overstepping of the constitutional limits set out in Lassiter and it is respectfully submitted that this case should be remanded to the Fifth Circuit to act in accordance with the Lassiter decision, a decision which they did not have the benefit of in handing down the en banc decision.[1/]

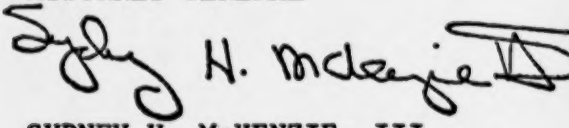
1/ Chief Judge James P. Coleman and Circuit Judge Charles Clark would, in fact, have deferred decision pending this Court's decision in Lassiter. Davis v. Page, supra, 640 F.2d 599, 605.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this matter should be remanded to the Fifth Circuit for action in accordance with the decision of this Court in Lassiter v. Department of Social Services, supra.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL
Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
904/488-1573

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing SUPPLEMENTAL BRIEF has been furnished, by U. S. Mail, to MICHAEL R. MASINTER, ESQUIRE, Counsel of Record for Respondents, 7455 S.W. 82nd Court, Miami, Florida 33143 and CHESTER G. SENF, ESQUIRE, Department of Health and Rehabiliative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301, this 13th day of August, 1981.

Sydney H. McKenzie III

SYDNEY H. McKENZIE, III
CHIEF TRIAL COUNSEL